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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DONTAE LAVAR WYNNE, Defendant and Appellant.	B164489 (Los Angeles County Super. Ct. No. BA223703)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. Grimes, Judge. Affirmed in part, reversed in part, and remanded with directions.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, Sharlene A. Honnaka, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Dontae Lavar Wynne, appeals from his convictions for: two counts of carjacking (Pen. Code,[1] § 215, subd. (a)); two counts of second degree robbery (§ 211); assault with a firearm (§ 245, subd. (a)(2)); and three misdemeanor counts of resisting a peace officer. (§ 148, subd. (a)(1).) Defendant was also found to have personally used and been armed with a firearm in the commission of the two carjackings and the two robberies. (§§ 12022, subd. (a)(1), 12022.53, subd. (b).) The jury also found that the carjackings, robberies, and assault with a firearm were committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 182.66, subd. (b)(1).) Defendant contends: his continuance request should have been granted; he was entitled to a substitution of counsel hearing; he was misadvised as to the consequences of proceeding to trial; he could not be convicted of both robbery and carjacking; there was insufficient evidence of force or fear as to count 6; consecutive robbery sentences should not have been imposed; there was insufficient evidence to support the section 186.22, subdivision (b)(1) findings; and the trial court should have stricken the section 186.22, subdivision (b)(1) findings which resulted in indeterminate sentences as to counts 5 and 6. Additionally, there are other sentencing issues which we discuss. We remand for the purposes of limited resentencing.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On October 16, 2001, Rafat Elkhatib and Dereck Figueroa were working at Discount Stereo store. Mr. Elkhatib was

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

working inside the store. Mr. Figueroa was working in a separate installation area at the rear of the store. At approximately 3:50 p.m., two men, who were about 19 or 20 years old, entered the store. The men asked about different products. Three or four minutes later, two other men entered the store. One man was tall and "skinny" and approximately 23 or 24 years old. The other man, identified as defendant, was "heavy," weighed approximately 250 pounds, tall, and approximately 25 or 26 years old. Defendant had a teardrop tattoo under his eye.

Defendant and the thinner and younger man spoke to Mr. Elkhatib. Mr. Elkhatib was asked to come outside to look at a car. Mr. Elkhatib explained that he could not leave the store unattended. Mr. Elkhatib suggested the men go to the installation area and ask Mr. Figueroa to look at the car. In the meantime, the first two men continued to ask questions of Mr. Elkhatib about various products. Defendant and the other man appeared to have taken the car to the back of the store. But defendant soon appeared again at the door between the two areas of the store. Mr. Elkhatib felt uneasy about defendant's demeanor. Mr. Elkhatib picked up a wireless panic button, but did not activate it.

Mr. Figueroa, who was installing equipment in a customer's red Mitsubishi, was approached by defendant and the thin tall man. They asked about a stereo system. When Mr. Figueroa looked in the trunk of their light-colored older Nissan, he lifted a towel and saw an AK-47 rifle with a magazine attached. Suddenly defendant pushed Mr. Figueroa aside and pulled out the gun. Defendant held Mr. Figueroa against the wall. Another man approached with a handgun.

A few minutes later the first two men left the store. Mr. Elkhatib went to the door to the installation area. Defendant immediately grabbed Mr. Elkhatib. Defendant had an AK-47 automatic assault weapon in one hand. Defendant put the gun in Mr. Elkhatib's face. Defendant saw the panic button in Mr. Elkhatib's hand. Defendant ordered Mr. Elkhatib to drop the panic button. Defendant began swearing at Mr. Elkhatib and asking about the alarm. Mr. Elkhatib described what occurred as follows: "[H]e kept

asking me—cussing me out and asking if I had pressed that button at any time. And I sweared to him that I didn't."

Defendant ordered Mr. Elkhatib to sit inside the back seat of the aforementioned Nissan, which had been driven into the installation area. Mr. Figueroa was placed in the front seat of the car. The younger skinny tall man was inside the back seat holding a handgun. Defendant exchanged weapons with the taller man inside the Nissan. The taller man inside the Nissan then demanded Mr. Elkhatib's wallet. Mr. Elkhatib's briefcase, credit cards, collectable coins, and cellular phone were also taken. The tall skinny man also demanded the contents of Mr. Figueroa's pockets. Mr. Figueroa turned over his wallet. Defendant returned and demanded the keys for the glass case where the radios were stored. Mr. Elkhatib explained that the glass door would slide open without a key. Defendant said, "Stop bullshitting and just give me the keys." Mr. Elkhatib tried to explain again that no keys were needed. The tall skinny man hit Mr. Elkhatib in the face with the rifle. Mr. Figueroa then explained that no keys were necessary. Mr. Elkhatib saw the two younger men that had been present in the store earlier. At various times, each of them held a gun. Defendant and the other men made several trips into the store and returned with stereos and other products.

A customer's red Mitsubishi Eclipse was parked in front of the Nissan where Mr. Figueroa found the AK-47. Defendant demanded the keys to the red Mitsubishi and another customer's car. The second car was a 1994 Mitsubishi Galant or Diamante. Mr. Elkhatib had access and control of the cars while they were at the shop for installations. Defendant appeared to be the leader. Defendant returned to the Nissan approximately eight times to ask Mr. Elkhatib questions. Defendant and the two younger men filled their automobile and the customers' cars with merchandise from the stereo store. Defendant dragged Mr. Elkhatib to the cash register. The cash register was emitting a beeping noise that defendant feared was an alarm. Defendant then returned Mr. Elkhatib to the car. Later, defendant told Mr. Elkhatib to get the videotape from the surveillance cameras. Mr. Elkhatib tried to explain that although the cameras were

working, the video recorder was inoperable. Defendant did not believe Mr. Elkhatib. Defendant dragged Mr. Elkhatib to the installation area. Defendant had Mr. Elkhatib face the wall. Defendant smashed Mr. Elkhatib against the wall. Someone kicked Mr. Elkhatib in the back and spoke about "finish[ing] him up." The men continued to slam Mr. Elkhatib against the wall. Mr. Figueroa told them that Mr. Elkhatib was telling the truth. Mr. Elkhatib's hands were tied behind him with a shoelace. Mr. Elkhatib was pushed from behind into the bathroom.

Shortly thereafter, Mr. Figueroa was tied up and brought to the bathroom. Mr. Figueroa said the men were going to leave. The door opened again. Defendant pulled Mr. Figueroa out. Shortly thereafter Mr. Figueroa returned to the bathroom. Mr. Figueroa described what the robbers related while Mr. Elkhatib remained in the bathroom: Mr. Figueroa indicated the robbers wanted to drive away in the red Mitsubishi; but they could not drive it because none of the robbers could operate a car with a manual transmission; as a result, the robbers wanted Mr. Figueroa to drive the car; thereafter, the robbers said Mr. Figueroa could keep the red Mitsubishi. Apparently, the robbers thought Mr. Figueroa was the owner of the red Mitsubishi. Once it became quiet, Mr. Elkhatib and Mr. Figueroa emerged from the bathroom and summoned the authorities. Both Mitsubishi automobiles belonging to customers were taken by defendant and the other three robbers. Both Mr. Elkhatib and Mr. Figueroa independently positively identified defendant from a photographic lineup as the heavyset individual that appeared to be directing the others during the incident at the stereo store. They also identified defendant at trial.

On October 22, 2001, Los Angeles Police officers were notified that defendant, a member of a local gang, was wanted for armed robbery. They were informed that the local gang was scheduled to have a carwash that day at St. Andrews Park. The anticipated place of the carwash was within the gang's territory. Defendant was expected to attend the carwash. Los Angeles Police Officers Dale Lopez, Todd Burns, Andrew Paredes, and Art Talamante were among the officers who planned to arrest defendant.

Officers Lopez and Burns were notified that someone matching defendant's description had been seen at a restaurant near the park. The officers saw defendant inside the restaurant. Officer Burns approached defendant inside the restaurant. Defendant was asked for his identification. Defendant became agitated and raised both his hands and his voice. Defendant was very defensive, adamantly claiming he had not done anything. Officer Burns attempted to calm defendant. Two men approached the officers. The men asked why defendant was being questioned. These two men also became agitated and loud. Officer Lopez instructed the men to step back and not interfere. However, the two men continued to approach and question the officers. Defendant began moving towards the door. Officer Burns loudly ordered defendant three or four times to stop and not move. Officer Lopez told defendant not to move.

Officer Lopez turned to face the other two men that continued to question him. The officers had been informed that all the men in the area were possibly gang members and were armed. Defendant forced his way out the door. Officer Burns grabbed defendant around the waist in a "hug." Defendant continued to move out the door. Officer Burns fell forward. Officer Lopez grabbed the top of defendant's pants. As defendant continued to move, Officer Burns fell on his knees to the ground. Officer Burns shouted out, "Ow." Officer Burns lay on the ground holding his knee. Officer Lopez lost his grip on defendant. Defendant ran toward a nearby alley. Officer Burns said he could not run and directed Officer Lopez to go after defendant.

Officer Lopez chased defendant through an alley. A police car drove up as defendant reached St. Andrews Park. The police car blocked defendant's path. Another officer came from behind. Four officers surrounded defendant. Officers Paredes and Martin got out of the patrol car. Officer Paredes ran toward defendant. Officer Martin ordered defendant to stop who nonetheless continued to run. Officer Paredes grabbed defendant's left arm. Officer Paredes attempted to pull defendant down. Both Officer Paredes and then defendant fell to the ground. Officer Martin grabbed defendant's left arm. Defendant continued to resist. Defendant put his hands beneath his chest and

moved from side to side to avoid having his arms pulled from under him. Officer Paredes repeatedly told defendant to comply with their commands. With the assistance of additional officers, including Officer Talamante, Officer Paredes was able to handcuff defendant. Although defendant was standing, he refused to walk to the patrol car. The officers had to push him along to the car. Defendant refused to get inside the car. Defendant used his weight and size to flex and stiffen his body. Officer Paredes had to enter the patrol car from the opposite side and pull defendant into the cruiser. In order to accomplish this, Officer Paredes had to pull on defendant's belt.

As a result of the struggle with defendant, Officer Paredes sustained some minor injuries. Officer Paredes was treated by a doctor for an injury to his wrist. Officer Paredes was placed on light duty for three days. Officer Burns suffered a knee injury. Officer Burns was placed on "injured on duty" status. Officer Talamante strained his right ring finger and scraped his knuckles and elbow during the incident. Officer Talamante was placed on light duty for a week.

Officer Cliff Chu was a gang investigator in the Los Angeles Police Department's special enforcement unit. Officer Chu was assigned to investigate numerous gangs, including the one of which defendant was a member. Defendant had gang tattoos on his body. Officer Chu was present at a time when defendant was arrested in the presence of numerous gang members. The arrest occurred at a place frequented by gang members. Defendant is listed in "Cal Gangs," an automated gang tracking system database, as a member of the local gang. Officer Chu was familiar with the convictions of two other members of defendant's gang for robbery and carjacking. The minute orders related to those convictions demonstrated that defendant's gang was engaged in a pattern of criminal activity.

Officer Chu was familiar with the crimes that occurred at Discount Stereo on October 16, 2001. Based on his review of the police reports and discussions with the investigating officers, Officer Chu believed that those crimes were committed in furtherance of the gang activity. Officer Chu said his belief was based upon the fact that

the crimes were committed with numerous individuals, demonstrating a cooperative cohesion to commit the violent crime. The crimes also involved numerous weapons of the type that are primarily used by gangs. Officer Chu believed that the fact that defendant directed the others in the commission of the crimes demonstrated a hierarchy suggestive of gang culture. Those gang members that have gained respect have the ability to direct younger individuals to commit acts of violence or crime. In addition, AK-47 assault weapons are coveted amongst gangs and often used in the commission of a crime. Finally, one of the cars taken in the robbery was recovered stripped in the gang's "territory." The second automobile was recovered in front of a known "gang location." Oftentimes, stolen cars are used by the gang members for a short time to commit additional crimes. The merchandise taken in the robbery of the stereo store would benefit the gang by producing "liquid currency" when resold. The money could then be used for the purchase of narcotics or weapons. Officer Chu thought it was unlikely that defendant would commit the robbery with individuals who were not members of the gang. This was because a gang member would not trust anyone else to use one of their weapons.

III. DISCUSSION

A. Continuance to Allow Defendant to Retain Counsel

Defendant argues that the trial court improperly denied his request to continue the trial to allow him to obtain retained counsel. The complaint in this case was filed on November 5, 2001. On December 28, 2001, the public defender's office declared a conflict of interest. Alternate Public Defender Sam Abrahamian was appointed to represent defendant. The preliminary hearing was conducted on January 27, 2002. The information was filed on January 29, 2002. An amended information was filed on April 24, 2002. On August 22, 2002, defendant appeared with Mr. Abrahamian. The

trial court asked defendant for his position regarding the prosecution offer of 19 years. Defendant indicated that he wanted to give it some thought and discuss it with his family. The matter was then continued to the following day. On August 23, 2002, the prosecutor indicated he was prepared to commence trial. A jury panel was called for that morning. Defendant indicated that he had felt pressured the previous day to accept the plea offer. Defendant requested permission to file a Code of Civil Procedure section 170.6 motion. The trial court indicated such a motion was untimely. Thereafter, defendant stated he had spoken with his family members the previous day. Defendant said his family wanted to hire a lawyer. Defendant inquired: "Is that possible or I can't do that? Because my mom is working on it right now as I speak. Because I don't feel that being—that I being misled to believe this, being misled to believe that. And it's been ten months. It's been ten—like locked up in custody for ten months, and I asked for a speedy trial. It's been ten months. Something ain't right. Something ain't right." The trial responded: "I can't continue the case, sir. I have to proceed with the trial."

Defendant then said: "So I feel that my counsel is not properly representing me. . . . [¶] First and foremost . . . I've been asking my lawyer for months what is it that the prosecution have against me. What is it that I'm looking at. How is it we gonna fight this case. Or have you located my witnesses. Have you contacted my boss. Is he gonna come testify to court for me. All these things that's gonna be important in fighting this trial in my case." Defendant reiterated his belief he was being "railroaded." Defendant then stated: "I don't even know actually what charge I'm being faced with . . . . I was told I was being charged with 211 P.C., second degree robbery. Then I've been told I'm charged with this. I don't really know what I'm actually in jail for right now." The trial court responded, "Is this turning into a Marsden?" Mr. Abrahamian, the deputy alternate public defender, responded: "The court could inquire. I'm gonna let [defendant] speak if that's what he wants to do. I'm gonna ask to represent himself at this point. I'm not gonna defend any action that I've taken. If the court wishes to inquire if that's what he's intending to do, that's fine."

The trial court then explained defendant's option to represent himself. Defendant acknowledged that he had reviewed the "Pro Per" petition given to him. The trial court further explained defendant's constitutional rights to: counsel; a speedy and public trial; subpoena witnesses; call and cross-examine witnesses; and testify at trial. Defendant acknowledged he understood those rights. The trial court also explained the responsibilities of representing himself. Ultimately, the trial court asked defendant if he wanted to proceed in propria persona. Defendant indicated he was not ready to do so.

Defendant again voiced his desire to pay a lawyer to provide representation. The trial court indicated it was too late for that option. The trial court asked, "Don't you want to keep Mr. Abrahamian?" Defendant again questioned the trial court regarding being represented by a retained attorney. The trial court responded, "I need an attorney who is present here in court telling me he or she is prepared to continue in the trial—or, you know, continue with the trial on a very short—within a very short period of time. But I would need an actual person here." Ultimately, the trial court asked defendant if he wanted to represent himself. Defendant asked why the court continued to ask him the same questions. The trial court responded: "I assume you do not. I assume you want Mr. Abrahamian to represent you." Defendant said: "I told you let's go." Mr. Abrahamian asked, "With me?" Defendant responded: "Yeah. Let's do it."

The California Supreme Court has held: "The right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing. [Citations.]' [Citation.]" (*People v. Courts* (1985) 37 Cal.3d 784, 789, quoting *People v. Holland* (1978) 23 Cal.3d 77, 86, overruled on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7.) However, the Supreme Court held: "[T]he right [to retain counsel of choice] 'can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citations.]" (*People v. Courts, supra,* 37 Cal.3d at p. 790, original italics, quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 208; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 849-850.) The

Supreme Court has held: "The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.' [Citation.]" (*People v. Courts, supra,* 37 Cal.3d at p. 790, quoting *People v. Byoune* (1966) 65 Cal.2d 345, 346.) In *People v. Ortiz* (1990) 51 Cal.3d 975, 983-984, the California Supreme Court held: "[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (Accord, *People v. Lara* (2001) 86 Cal.App.4th 139, 153.)

The *Courts* decision concluded: "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (*People v. Courts, supra,* 37 Cal.3d at pp. 790-791; *People v. Byoune, supra,* 65 Cal.2d at pp. 346-347; *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850.) On review, we look to the circumstances and reasons presented to the trial court at the time the request was denied to determine whether its denial of the continuance was so arbitrary as to violate due process. (*People v. Frye* (1998) 18 Cal.4th 894, 1013; *People v. Courts, supra*, 37 Cal.3d at p. 791; *People v. Crovedi, supra,* 65 Cal.2d at p. 207; *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850.) The defendant has the burden of demonstrating an abuse of discretion. (*People v. Courts, supra,* 37 Cal.3d at p. 791; *People v. Strozier* (1993) 20 Cal.App.4th 55, 60; *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.)

In this case, defendant waited until the date set for trial to request a continuance for purposes of retaining counsel. Defendant gave no reason for waiting until the last day to seek retained counsel. Defendant did not have the name of the attorney or any way of

verifying that the lawyer could go forward with trial in a short period of time. The record does not suggest defendant made a good faith, diligent effort to retain counsel before trial. As a result, defendant has not met his burden to show the trial court abused its discretion in denying his request for a continuance to secure new counsel. (*People v. Jeffers, supra,* 188 Cal.App.3d at p. 850; *People v. Rhines* (1982) 131 Cal.App.3d 498, 506.)

B. *Marsden* Hearing

Defendant further argues the trial court should have conducted a *Marsden* hearing based upon his voiced dissatisfaction with his appointed counsel. The pertinent facts are described in part III(A) of this opinion.

The Courts of Appeal have held: "[T]here is no obligation to initiate the *Marsden* inquiry sua sponte. A trial court's duty to conduct the inquiry arises '*only when the defendant asserts directly or by implication* that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.' [Citation.]" (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787, quoting *People v. Molina* (1977) 74 Cal.App.3d 544, 549; *People v. Lara, supra,* 86 Cal.App.4th at pp. 150-151.) Moreover, the California Supreme Court has held, "The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing." (*People v. Lucky* (1988) 45 Cal.3d 259, 281; see also *People v. Padilla* (1995) 11 Cal.4th 891, 927, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The California Supreme Court recently reiterated: "The governing legal principles are well settled. '"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly

shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." [Citations.]'" (*People v. Hart* (1999) 20 Cal.4th 546, 603, quoting *People v. Fierro* (1991) 1 Cal.4th 173, 204 and *People v. Crandell* (1988) 46 Cal.3d 833, 854; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 718; *People v. Barnett* (1998) 17 Cal.4th 1044, 1085; *People v. Hines* (1997) 15 Cal.4th 997, 1025.)

We review the trial court's denial of the motion for substitution of counsel for abuse of discretion. (*People v. Earp* (1999) 20 Cal.4th 826, 876; *People v. Hart*, *supra*, 20 Cal.4th at pp. 603-604; *People v. Horton* (1995) 11 Cal.4th 1068, 1102; *People v. Memro* (1995) 11 Cal.4th 786, 857; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.) Although defendant had a right to an adequate and competent defense, he did not have the right to present a particular theory of exculpation of his choosing. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729; see *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) Any purported tactical disagreements between defendant and Mr. Abrahamian alone did not establish an "irreconcilable conflict." (*People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729; *People v. Hines, supra,* 15 Cal.4th at p. 1025; *People v. Carpenter* (1997) 15 Cal.4th 312, 376 ["When a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant"].) Moreover, it is an abuse of discretion for the court to appoint new counsel absent a showing the appointed attorney does not or cannot adequately represent the defendant. (*People v. Smith* (1993) 6 Cal.4th 684, 696; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1022-1023, overruled on another point in *People v. Curle* (2001) 24 Cal.4th 1057, 1069, fn. 6.)

We conclude the judgment may not be reversed under the authority of *Marsden* and its progeny. Defendant's indication that he did not know the charges against him is refuted by his presence at the preliminary hearing and all proceedings between January

2002 and August 2002. The transcript of the preliminary hearing held January 15, 2002, involving the four counts of obstructing an executive officer clearly set forth the charges. Defendant pled not guilty to those charges on January 29, 2002. Likewise the transcript of the preliminary hearing conducted January 17, 2002, involves the charges were robbery, carjacking, and assault with a firearm. Defendant was physically present throughout the preliminary hearing. Defendant pled not guilty to those charges on January 29, 2002. On March 27, 2002, the cases were consolidated. On April 24, 2002, the information was amended to include all counts and defendant was rearraigned. Despite his voiced concern about delays in the trial, defendant personally stipulated to the dismissal and refiling of the charges against him pursuant to sections 1382 and 1387.2 on June 26, 2002. Moreover, some of the delays involved defendant's discovery motions pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535. It was not until the date set for trial after the jury panel had been summoned that defendant voiced any concern about Mr. Abrahamian. Defendant had already sought to delay the trial that day by attempting to disqualify the judge and obtain retained counsel.

Defendant's argument that he is entitled to reversal under the compulsion of *Marsden* and its progeny is close. Defendant did express dissatisfaction with Mr. Abrahamian's representation. But the trial court allowed defendant to fully explain his unhappiness. Defendant was allowed to fully relate specific examples of deficient conduct by Mr. Abrahamian. Many of defendant's contentions were directly belied by the record before the trial court. Defendant never asked that another attorney be appointed to replace Mr. Abrahamian. Eventually, after discussing the issue with the trial court, defendant explicitly expressed a desire to proceed to trial with Mr. Abrahamian. No *Marsden* due process violation occurred. (See *People v. Nakahara, supra,* 30 Cal.4th at pp. 718-719 [defendant's letter to the judge reflected only a difference of opinion over trial tactics and some generalized complaints regarding defense counsel's performance rather than a request for a new attorney requiring a *Marsden* hearing].) No further

Marsden inquiry was required. (*People v. Lucky, supra,* 45 Cal.3d at p. 281; see also *People v. Padilla, supra,* 11 Cal.4th at p. 927.)

C. Settlement Discussions

Defendant argues the trial court misled him during settlement discussions to believe he faced a 30 to 35-year-sentence if convicted rather than a life sentence. Defendant further argues that he was entitled to have new counsel appointed to represent him on a motion made pursuant to *In re Alvernaz* (1992) 2 Cal.4th 924, 934-935, footnote 5. We agree the trial court twice incorrectly identified defendant's potential sentence. But we agree with the Attorney General there is insufficient evidence *on direct appeal* Mr. Abrahamian misadvised defendant as to the maximum potential sentence.

In the decision of *In re Alvernaz, supra,* 2 Cal.4th at page 936, the California Supreme Court held, "[T]he rendering of ineffective assistance by counsel, resulting in a defendant's decision to reject an offered plea bargain and proceed to trial, constitutes a constitutional violation which is not remedied by a fair trial." The *Alvernaz* court further held: "To demonstrate that a defendant has received constitutionally inadequate representation by counsel, he or she must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; *and* (2) counsel's deficient performance subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*People v. Haskett* (1990) 52 Cal.3d 210, 248 []; see *Strickland v. Washington* [(1984)] 466 U.S. 668, 687-696 [].)" (*In re Alvernaz, supra,* 2 Cal.4th at pp. 936-937, original italics.)

If counsel's performance is determined to be deficient, a defendant must also prove, "[T]here is a reasonable probability that, but for counsel's deficient performance, [he or she] would have accepted the proferred plea bargain and that in turn it would have been approved by the trial court." (*In re Alvernaz, supra,* 2 Cal.4th at p. 937.) The

Alvernaz court further held: "In determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proferred plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*Id.* at p. 938.) The Supreme Court also held that while not dispositive in determining prejudice, an additional factor to be considered may be the defendant's stance at trial. (*Id.* at p. 940.)

In this case, plea negotiations were conducted prior to the commencement of trial. Defendant was offered a 19-year sentence. However, defendant indicated he would plead guilty only if sentenced to 15 years. The trial court explained that based upon its preliminary review of the case, "[T]here [was] a very grave risk that you will be convicted. And I think your likely sentence is in the range of 30 to 35 years. That is a very long time, sir. And you will do 85 percent of it." The trial court explained that it put pressure on the prosecutor to agree to the 19-year offer in the interest of resolving the case. The trial court later emphasized that defendant also faced enhancements related to his six prior serious felony convictions. The trial court informed defendant: "I might easily give you high term, which is upward of 35 years. Not out of any desire to, not out of any personal motivation. I think you know the law. A high term sentence would be well justified with your record in these crimes. [¶] . . . [¶] You're a pretty young man now. If you take this deal even at 85 percent you'll still be a vigorous man when you get out of prison. If you don't take this deal, you'll be an old man when you get out of prison. That's a big difference. And I just want to be sure that you've given it adequate

thought. [¶] I mean, no one is going to give you 15 years. And to reject 19 because you want 15, this is not worth the risk, sir. It just isn't. It doesn't add up. And I can't get them to do better than 19. I don't think I can do better than 19." Defendant responded: "You telling me 19 years and two strikes, what's the possibility of me ever coming home with 19 years and two strikes? [¶] . . . [¶] I mean, it's a war in the prison between races." Thereafter, defendant requested time to discuss the offer with his family and think about it. The trial court gave defendant until the following day to contemplate the offer.

When defendant appeared the following day, August 23, 2003, he indicated that he felt pressure had been placed upon him the previous day. The trial court responded: "Oh. Well, we were putting pressure on you, but only because—actually, the [prosecutor] wasn't putting pressure on you, I was. And I'm assuming [defense counsel] was in lockup. He didn't do it in open court, but I assume he did when he spoke with you privately. But I did put pressure on you. And the only reason I did so is because to me it seems foolhardy to risk what you do risk by taking the case to trial when you've got a 19-year offer." Thereafter, defendant sought to disqualify the trial court pursuant to Code of Civil Procedure section 170.6 and obtain *retained* counsel as set forth previously. Trial commenced on Monday, August 26, 2002. Defendant testified on his own behalf and denied any involvement in the robbery at Discount Stereo Warehouse.

At the time defendant was sentenced, the trial court indicated that based upon the pre-plea report and the prosecutor's sentencing memoranda, its intention was to impose a life sentence pursuant to section 186.22, subdivision (b)(4)(A). Defense counsel reported that defendant's position was that, "[H]ad he known he was facing a life sentence, he would not have hesitated in taking the disposition that was offered." The trial court found that based on the "enormous efforts" the court engaged in to persuade defendant to take the offer, it did not believe that defendant's decision would have been different had he known he would receive a life sentence. Defendant stated to the trial court, "You told me on the record that I was looking at 50 years. That's what you told me, you know

what I'm saying." Thereafter, Mr. Abrahamian declared a conflict of interest based on the fact that defendant was "ill-advised" as to the consequences of rejecting the plea offer. Mr. Abrahamian further stated: "Obviously I can't make the arguments to the court that I was wrong. I'll have to hold my position that I wasn't in this case. So I think he deserves an attorney to argue this matter to the court prior to sentencing." The trial court found no conflict of interest stating, "I, again, do not find that he would have taken any deal—any deal for a minute over the 15 or 16 years he insisted had to be the most he would spend." The trial court then: noted it had given defendant four months to find an attorney to make post-trial arguments for him and he had not done so; found that defendant was afforded a fair trial and was competently represented; and refused to continue the sentencing hearing. Defendant was sentenced to consecutive indeterminate prison terms of life with the possibility of parole on the two carjacking counts, with a minimum eligible parole date of 19 years on each. The trial court also imposed consecutive determinate terms.

Before ineffective assistance of counsel may be found, there must be proof not only that the defense attorney's performance was deficient but also that defendant suffered prejudice as a consequence. (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Horton, supra,* 11 Cal.4th at p. 1122; *In re Fields* (1990) 51 Cal.3d 1063, 1068-1069; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Furthermore, we engage in a presumption, which it is defendant's burden to overcome, that counsel's performance came within the wide range of reasonable professional assistance and was the product of sound trial strategy. (*Strickland v. Washington, supra,* 466 U.S. at pp. 689-690; *People v. Hart, supra,* 20 Cal.4th at p. 624; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; *People v. Lewis* (1990) 50 Cal.3d 262, 288.) Moreover, the California Supreme Court has held: "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that

course should be followed." (*Strickland v. Washington*, *supra,* 466 U.S. at p. 697; *In re Fields, supra,* 51 Cal.3d at p. 1079.)

No doubt, prior to trial, the trial court twice inaccurately identified defendant's maximum sentence. Defendant was subject to two potential life sentences plus a lengthy determinate term—not merely up to 35 years in prison. However, what is missing from the evidentiary record on direct appeal is what advice was given by Mr. Abrahamian to defendant. Also, there is no evidence as other pertinent advice given to defendant by Mr. Abrahamian. A corollary of these gaps in the record on direct appeal is whether there is a reasonable probability defendant was in fact misled by the trial court's inaccurate description of the maximum sentence. The trial court expressed disbelief when defendant claimed he did not know he faced potential life sentences. For purposes of direct appeal, this is sufficient to defeat defendant's claim he was unaware he was potentially subject to life sentences when he rejected the 19-year pretrial offer. (*Strickland v. Washington, supra,* 466 U.S. at p. 697; *In re Alvernaz, supra,* 2 Cal.4th at p. 946.)

Recognizing these gaps in the evidentiary record, experienced appointed appellate counsel filed a habeas corpus petition which contains prima facie evidence defense counsel in fact acted ineffectively. In response to the habeas corpus petition, we have issued an order to show cause returnable to the trial court. (*In re Wynne* (Mar. 2, 2004, B172290) [nonpub. order].) This will assure a full hearing on defendant's due process and ineffective assistance of counsel contentions.

D. Defendant's Robbery and Carjacking Convictions

Defendant argues that the crimes of carjacking in counts 5 and 6 were subsumed into the robbery counts. Defendant further argues, "Where an automobile is part of the property taken during the course of a robbery, the theft, (§ 487[, subd.] (d)) is a lesser included offense of robbery." We disagree. Counts 5 and 6 of the consolidated

information charged defendant with carjacking. Both counts 5 and 6 of the consolidated information explicitly refer to the taking of a "motor vehicle." By contrast, counts 7 and 8 in the consolidated information, the robbery charges, more broadly alleged the taking of "personal property." In *People v. Ortega* (1998) 19 Cal.4th 686, 692-693, 700, the California Supreme Court held, "In enacting the carjacking statute (§ 215), the Legislature made clear its intention to permit multiple convictions of carjacking and robbery based upon the same conduct." Further, the robberies of the two victims involved the taking of their personal property and the merchandise in the stereo store. The carjackings, on the other hand, involved the later distinct offenses of taking the automobiles entrusted to their care by customers. (*People v. Ortega, supra,* 19 Cal.4th at p. 700; *In re Travis W.* (2003) 107 Cal.App.4th 368, 375; *People v. Green* (1996) 50 Cal.App.4th 1076.) There is no merit to defendant's multiple conviction contention.

E. Evidence of Force or Fear in the Carjacking of Mr. Figueroa

In count 6, defendant was charged with carjacking and the victim was Mr. Figueroa. Defendant argues there was insufficient evidence to support his count 6 carjacking conviction because there was no evidence that the cars were taken by force or fear as the statute requires. As noted previously herein, we view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319; *People v. Osband*, *supra*, 13 Cal.4th at p. 690; *Taylor v. Stainer*, *supra*, 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The Supreme

Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Section 215, subdivision (a) provides: "'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." Defendant argues there was no force or fear with respect to Mr. Figueroa because there was no "confrontation" or demand with respect to the automobiles taken. We disagree. From the moment Mr. Figueroa discovered the AK-47 rifle in the trunk of the Nissan, there was substantial evidence the carjacking was the product of force and fear. Mr. Figueroa was forced against the wall while defendant held the AK-47 and an accomplice was armed with a handgun. Mr. Figueroa was forced into the Nissan, where he was held at gunpoint. Mr. Figueroa was tied up and forced into a bathroom, only to be dragged out again shortly thereafter to assist the assailants in operating the red Mitsubishi. There was substantial evidence that Mr. Figueroa was subjected to both force and fear in the carjacking of the two automobiles. (*In re Travis W., supra,* 107 Cal.App.4th at p. 375 [carjacking can have multiple victims who do not have to be owners of the property and who are subjected to a threat of violence and a high level of risk]; *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1144-1145 [same]; see also *People v. Lopez* (2003) 31 Cal.4th 1051, 1058; *People v. Hill, supra,* 17 Cal.4th at p. 860 [carjacking subjects even an unconscious possessor or occupant (an infant) to a risk of harm greater than that involved in an ordinary theft].)

F. Consecutive Robbery Sentences

Defendant argues that the trial court improperly sentenced him to consecutive terms for the two robbery convictions. He argues this violates the provisions of section 654, subdivision (a), which states in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." We review the trial court's order imposing multiple sentences in the context of a section 654, subdivision (a), question for substantial evidence. (*People v. Osband, supra,* 13 Cal.4th at pp. 730-731; *People v. Downey* (2000) 82 Cal.App.4th 899, 917; *People v. Oseguera* (1993) 20 Cal.App.4th 290, 294-295.) In conducting the substantial evidence analysis we view the facts in the following fashion: "We must 'view the evidence in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' (*People v. Holly* (1976) 62 Cal.App.3d 797, 803 [].)" (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698; see also *People v. Green, supra,* 50 Cal.App.4th at p. 1085.) The Supreme Court has held, "Robbery is [a] violent conduct warranting separate punishment for the injury inflicted on each robbery victim." (*People v. Champion* (1995) 9 Cal.4th 879, 935; *People v. Miller* (1977) 18 Cal.3d 873, 885-886.) Substantial evidence supports a finding of a *divisible* course of conduct based upon defendant's intent and multiple objectives.

At the time of sentencing in this case, the trial court noted: "The crimes alleged in counts 5 [carjacking], 6 [carjacking], 7 [robbery] and 8 [robbery], and their objectives, were predominantly independent of each other as the purpose of the robberies was to obtain the victim's personal property and the store's merchandise, whereas the purpose of the carjackings was to effect an escape." We agree with the Attorney General that the trial court reasonably could have concluded defendant had the intent to rob the stereo store by removing Mr. Elkhatib from the presence of two other accomplices in the store

on the ruse of looking at their car parked outside. When Mr. Elkhatib suggested defendant and the taller man take their car to the rear installation area, the robbery changed course to include Mr. Figueroa as well. Defendant and his accomplices began taking merchandise from the store. Thereafter, defendant's tall, skinny companion demanded the wallets and other personal items of both Mr. Figueroa and Mr. Elkhatib. The trial court could reasonably have deduced that the taking of the wallets and personal effects were separate and distinct crimes following the carjackings by several minutes. As a result, the trial court legitimately could have decided that separate sentences were proper. (See *People v. Green, supra,* 50 Cal.App.4th at pp. 1083-1085 [defendant's robbery of victim's purse was a separate incident from the subsequent sexual assault and theft of her car]; *People v. Harrison* (1989) 48 Cal.3d 321, 337-338 [separate and consecutive punishment proper where the defendant harbored separate intents to obtain gratification with each sexual penetration against the same victim]; *People v. McGuire, supra,* 14 Cal.App.4th at p. 699; *People v. Trotter* (1992) 7 Cal.App.4th 363, 366-368 [a defendant who fired three separate shots from a commandeered taxi at a pursuing officer had separate intents for each shot fired]; *People v. DeLoach* (1989) 207 Cal.App.3d 323, 338 [act giving rise to pandering held separate, distinct, and different from forcible sex acts that followed].)

G. Gang Allegations

Defendant argues there was insufficient substantial evidence to support the gang findings pursuant to section 186.22, subdivision (b)(1). As noted previously, in reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *People v. Osband, supra,* 13 Cal.4th at p. 690; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S.

at pp. 318-319; *People v. Bolin, supra,* 18 Cal.4th at p. 331; *People v. Marshall, supra,* 15 Cal.4th at pp. 33-34; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) The Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, 18 Cal.4th at pp. 331-332, quoting *People v. Redmond, supra,* 71 Cal.2d at p. 755.)

Section 186.22, subdivision (b)(1) provides in part: "[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . by an additional term . . . ." Defendant argues, although four persons robbed the stereo store, he was the only one arrested. Defendant acknowledges that he admitted membership in the local gang. However, he further argues: the victims were unable to describe the other three suspects who participated in the robbery; neither victim saw or heard anything that connected the four assailants with a gang; the crimes were committed in a city other than the territory of a rival gang; there was "no word on the street that the crime was committed by [defendant's gang]"; and the usual motives of gang retaliation was not present. Defendant further argues the only evidence that the crimes were gang related was furnished by Officer Chu.

The California Supreme Court recently interpreted this portion of the California Street Terrorism Enforcement and Prevention Act of 1988: "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities. Both past and present offenses have some tendency in reason to show the group's primary activity (see Evid. Code, § 210) and therefore fall within the general rule of admissibility (*id.,* § 351). . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) The *Sengpadychith*

court concluded: "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute [(§ 186.22, subd. (e))]. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605. . . ." (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324, original italics.)

In *Gardeley,* a San Jose Police Department detective testified that the gang of which the defendant had been a member engaged in the sales of narcotics and witness intimidation. The detective had personally investigated "hundreds of crimes" committed by gang members. The detective gathered information from conversations with gang members as well as San Jose Police Department employees and other law enforcement agencies. (*People v. Gardeley, supra,* 14 Cal.4th at p. 620.) Opinion testimony of the type presented in *Gardeley* may constitute evidence sufficient to support a section 186.22 finding. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

In this case, defendant had been a member of the local gang since he was 12 years old and had several gang tattoos. Defendant acknowledged that some of the members of his gang were involved in the sale of narcotics, robberies, carjackings, assaults with firearms, shootings, murder, vandalism, and graffiti. Officer Chu testified that he had been a gang investigator for approximately three years. In these assignments, Officer Chu conducted hundreds of investigations involving gang crimes and "contacted hundreds, if not [a] thousand" gang members and associates. Officer Chu was assigned to investigate defendant's gang and others in the same area and was familiar with their territories, tattoos, gang signs, and monikers. Defendant was listed in the statewide computerized system known as "Cal Gangs" as a member of the local gang. Defendant's tattoos identified him as a member of that gang as well. Officer Chu testified that common gang activities included the commission of crimes including narcotics possession and sales, drive-by and walk-up shootings, street and business robberies, and homicides. Officer Chu noted that these criminal activities reinforce the gang stronghold

by obtaining money and property and to attain status and intimidate victims. Officer Chu further testified regarding the past felony convictions of Arthur Terrell Morrow for robbery and carjacking and Percy Wade for robbery. Both Mr. Morrow and Mr. Wade were members of defendant's gang. Moreover, Officer Chu believed that the crimes of these gang members represented a pattern of criminal activity by that gang. Finally, Officer Chu believed the robberies, carjackings, and assault with a deadly weapon in this case were committed "in association with [or] for the benefit of or to promote the [street gang] . . . ." He based that opinion on: the fact that the crime was committed with numerous individuals, demonstrating a cooperative cohesion to commit violent crime; the crime involved numerous weapons of the type used by gangs; there was a level of hierarchy in the direction of younger participants by older gang members; the use of the AK-47 rifle by the leader of the group; both of the automobiles taken were recovered in the local gang territory and one had been stripped; stolen cars are often used to commit other crimes such as drive-by shootings and then dumped; the stereo equipment stolen could be easily sold on the street with proceeds used to purchase drugs or weapons. Officer Chu believed it would be highly unlikely that defendant, a gang member, would commit a crime with someone other than gang members or those being inducted into a gang. The use of multiple weapons further suggests there was a high level of trust in those participating. The testimony in the present case coupled with Officer Chu's fact specific opinion and the evidence of past criminal activities constituted substantial evidence to support the jury's finding the crimes were committed to promote gang activities. (*People v. Sengpadychith, supra,* 26 Cal.4th at pp. 322-324; *People v. Gardeley, supra,* 14 Cal.4th at pp. 624-626.)

H. Trial Court's Refusal to Strike the Gang Finding

Defendant argues the trial court abused its discretion in refusing to strike the gang *enhancement* as to counts 5 and 6 pursuant to section 186.22, subdivision (g).[2] At sentencing, defense counsel argued that the gang enhancements should be stricken because nothing specific connected the crimes to gangs in this case and the carjackings were not of the type envisioned by the Legislature in enacting section 186.22. The sentencing court declined to do so. On appeal, defendant further argues that he was sentenced to a more severe sentence because he refused the pretrial offer of 19 years and exercised his jury trial right.

As the Attorney General points out, the trial court imposed a sentence in this instance pursuant to section 186.22, subdivision (b)(4). The California Supreme Court has held that section 186.22, subdivision (b)(4), is an *alternate penalty* of life imprisonment rather than an *enhancement* imposed pursuant to subdivision (b)(1). (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898-899 [the 15-year minimum term for crimes punishable pursuant to section 186.22, subdivision (b)(4), does not fall within California Rules of Court, rule 405(c)'s definition of an enhancement and is not added to the base term]; *People v. Jefferson* (1999) 21 Cal.4th 86, 100-101 [same].) As a result, the trial court's section 186.22, subdivision (g) discretion to strike *enhancements* is inapplicable.

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[2] Section 186.22, subdivision (g) provides: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

I. Other Sentencing Issues

1. Section 12022.53 enhancements as to counts 5 and 6

As to counts 5 and 6, the jury found defendant guilty of carjacking in violation of section 215, subdivision (a). Additionally, the jury found as to both counts: a principal involved in the commission of the carjackings was armed with a firearm within the meaning of section 12022, subdivision (a); defendant personally used a firearm within the meaning of section 12022.53, subdivision (b); and the carjackings were committed for the benefit of a street gang within the meaning of section 186.22, subdivision (b)(1). The trial court imposed consecutive sentences of life with a minimum term of 19 years. However, the trial court failed to impose the 10-year enhancements pursuant to section 12022.53, subdivision (b) as to either count 5 or 6.

Based upon the section 186.22 findings, the court was required to impose a life sentence as to each count and fix the minimum term. Section 186.22, subdivision (b)(4) states in pertinent part: "(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraphs (B) or (C) of this paragraph. [¶] (B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55." The trial court

selected the upper term for the robbery, 9 years, added the 10-year enhancement pursuant to section 12022.53, subdivision (b), and thereby fixed the minimum term, as required by section 186.22, subdivision (b)(4), at 19 years as to both counts 5 and 6.

However, section 12022.53, subdivision (b) requires that the 10-year additional term also be imposed. Section 12022.53, subdivision (b) states: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." Section 12022.53, subdivision (e)(1), as it was in effect when defendant committed the carjackings on October 16, 2000, stated, "The enhancements specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved." (Stats. 2000, ch. 287, § 23.) Since, both defendant's firearm use and the gang allegation were both pled and proved, the 10-year enhancement must be added to the indeterminate sentences imposed as to both counts 5 and 6. There is no prohibition against the 10 years being used to calculate the minimum term as required by section 186.22, subdivision (b)(4)(A) and as an additional term of imprisonment for firearm use. In fact, section 12022.53, subdivision (e)(1) as it was in effect at the time of defendant committed the carjackings requires such. (Section 12022.53, subdivision (e)(1) now also requires imposition of the additional term but has more precise pleading and findings requirements.)

2. The count 7 sentence

As to count 7, the jury convicted defendant of the robbery of Mr. Elkhatib and made findings pursuant to: section 12022, subdivision (a); section 12022.53, subdivision (b); and section 186.22, subdivision (b)(1). The trial court, having selected

the indeterminate term as to count 5 as the principal term imposed a subordinate term of 4 and one-third years as to count 7 as follows: one-third of the middle term of 3 years for robbery; one third of the 10 years required by section 186.22, subdivision (b)(1)(C)[3] resulting from the gang enhancement; and no time was imposed for the section 12022.53, subdivision (b) because it was stayed.

The foregoing sentence involves the following mistakes. First, count 5, an indeterminate sentence, could not be used as a principal term. In *People v. Felix* (2000) 22 Cal.4th 651, 659, the California Supreme Court held: "Section 1170, subdivision (a)(3), states that the [Determinate Sentencing Act] does not 'affect any provision of law that . . . expressly provides for imprisonment in the state prison for life,' thus demonstrating that such a sentence is *not* determinate. . . . [A] straight life sentence, as well as a sentence of some number of years to life, is *not* a determinate sentence within the meaning of the [Determinate Sentencing Act]." In *People v. McGahuey* (1981) 121 Cal.App.3d 524, 531-532, our colleagues in the Court of Appeal for the Fourth Appellate District held that an indeterminate term could not be used as a principal term to which a determinate term was subordinate: "Life sentences are imposed pursuant to section 1168, subdivision (b), of the Penal Code which prohibits the sentencing court from fixing the actual term or duration of the period of imprisonment. Other sentences (i.e., determinate sentences) are imposed pursuant to section 1170 of the Penal Code. Section 669 of the Penal Code . . . provides that a consecutive life sentence shall be served subsequent to a determinate term of imprisonment. [¶] . . . [¶] It is of great

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[3] Section 186.22, subdivision (b)(1)(C) states: "(b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

significance that the wording of section 1170.1, subdivision (a), specifically limits its application to consecutive terms imposed under 'Sections 669 *and 1170*.' (Italics added.) Thus, it must follow that section 1170.1, subdivision (a), cannot apply to consecutive terms imposed under sections 669 *and 1168*, the case here." Our colleagues in Division Two of this appellate district held: "[W]hen one term is determinate and the other is indeterminate, neither is principal or subordinate; instead, each is calculated without reference to the other." (*People v. Reyes* (1989) 212 Cal.App.3d 852, 858; *People v. Lyons* (1999) 72 Cal.App.4th 1224, 1228 [separate treatment of determinate and indeterminate terms is now considered a "basic parameter" of sentencing law]; *People v. Day* (1981) 117 Cal.App.3d 932, 936-937.)

Moreover, California Rules of Court, rule 4.451(a) provides: "When a defendant is sentenced under section 1170 and the sentence is to run consecutively to a sentence imposed under section 1168 . . . , the judgment shall specify the determinate term imposed under section 1170 computed without reference to the indeterminate sentence. . . ." (See also *People v. Nguyen* (1999) 21 Cal.4th 197, 203 ["Section 1170.1 . . . specifies the usual principal term/subordinate term methodology for calculating *consecutive determinate terms* for felonies . . . ." (Italics added.)].) As a result, the 25-year-to-life term imposed in count 5 here may not be deemed the principal term under section 1170.1 with the sentence on count 7 treated as a subordinate term. Where a trial court imposes a consecutive indeterminate and determinate term, the one-third limit for consecutive terms set forth in section 1170.1, subdivision (a) is inapplicable to the base or principal term. The full term must be imposed on the principal term. (*People v. Felix, supra,* 22 Cal.4th at p. 656; *People v. Reyes, supra,* 212 Cal.App.3d at p. 856; 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 286, pp. 377-378.) Hence, as to count 7, the court on remand is to select one of the three terms set forth in section 213, subdivision (a)(2) and impose it as the base term in full. The trial court is to then impose the full 10-year section 186.22, subdivision (b)(1)(C) enhancement. We agree with the

trial court's determination to stay the firearm use finding as required by section 12022.53, subdivision (f).

3. Count 9 sentence

In count 9 of the consolidated information, defendant was charged with assault with a firearm in violation of section 245, subdivision (a)(2). Further, it was alleged that defendant personally used a firearm within the meaning of sections 667.5, subdivision (c), 1192.7, subdivision (c), and 12022.5. Finally, the consolidated information alleged in count 9 that the assault with a firearm was committed for the benefit of a street gang within the meaning of section 186.22, subdivision (b)(1). As to count 9, the jury convicted defendant of assault with a firearm in violation of section 245, subdivision (a)(2) and found the section 186.22, subdivision (b)(1) gang allegation to be true. No finding was returned on the firearm use allegation.

The trial court imposed a sentence on count 9 but ordered it stayed pursuant to section 654, subdivision (a). The trial court orally imposed the following sentence as to count 9: "For the offense in count 9, assault with a firearm, in violation of Penal Code section 245, [subdivision] (a) subsection (2), the court imposes the midterm of three years, plus ten years pursuant to Penal Code section 12022.53(B), and at the request of the People, stays the sentence pursuant to Penal Code section 654. [¶] This crime and its objective were predominantly independent of the other crimes. And accordingly, if the stay is vacated in the future, this term shall be served consecutively to the terms previously pronounced."

The judgment must be modified as follows. First, if the sentence is ultimately subject to being run consecutively, then only one-third of the midterm plus any

enhancement can be imposed pursuant to section 1170.1, subdivision (a).[4] Hence, the count 9 sentence for assault with a firearm must be modified so that if the section 654, subdivision (a) stay is vacated, defendant is to serve one year in state prison. The remaining two years on the three-year midterm are to be stayed in that event pursuant to California Rules of Court, rule 4.447.[5] Second, the 10-year sentence pursuant to section 12022.53, subdivision (b), must be reversed. No section 12022.53, subdivision (b) was ever returned as to count 9. Third, the trial court did not impose a term for the section 186.22 gang enhancement finding returned by the jury. `The maximum term for the count 9 section 186.22 gang enhancement is five years. That sentence is calculated as follows. Section 186.22, subdivision (b)(1)(B) provides that if the offense to which the gang finding is attached is a serious felony, an additional five years shall be imposed.[6] Pursuant to section 1192.7, subdivision (c)(31), assault with a firearm is a serious

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[4] Section 1170.1, subdivision (a) states in pertinent part: "The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

[5] Rule 4.447 of the California Rules of Court states: "No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed."

[6] Section 186.22, (b)(1)(B) states: "If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years."

felony.[7] (*People v. Luna* (2003) 113 Cal.App.4th 395, 398-399.) Under no circumstances could a 10-year gang enhancement be imposed pursuant to section 186.22, subdivision (b)(1)(C) because assault with a firearm is not a violent felony within the meaning of section 667.5, subdivision (c)(8)[8] as no firearm use finding was returned. (*In re Cruse* (2003) 110 Cal.App.4th 1495, 1498-1499 [§ 186.22, subd. (c)(8) requires great bodily injury finding to be actually returned].) Hence, one-third of the section 186.22, subdivision (b)(1)(B) five-year gang enhancement is one year, eight months. The remaining three years, four months is to be stayed in compliance with California Rules of Court, rule 4.447. Upon issuance of the remittitur, the stayed sentence as to count 9 is modified to be two years, eight months. (See *People v. Bond* (1981) 115 Cal.App.3d 918, 921-922.)

4. Counts 1, 2, and 3

The trial court imposed a six-month term as to each of the resisting a peace officer convictions in counts 1, 2, and 3 without reference to whether they were concurrent or consecutive. The trial court then stayed the sentences in counts 2, and 3 apparently

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[7] Section 1192.7, subdivision (c)(31) states in part: "(c) As used in this section, 'serious felony' means any of the following: [¶] . . . (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245 . . . ."

[8] Section 186.22, subdivision (b)(1)(C) states, "If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." Section 667.5, subdivision (c)(8) states in pertinent part: "(c) For the purpose of this section, 'violent felony' shall mean any of the following: [¶] . . . [¶] (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 or 12022.55."

pursuant to section 654, subdivision (a). The incorrect application of section 654, subdivision (a) is a jurisdictional error which can be raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Perez* (1979) 23 Cal.3d 545, 549-550.) These convictions relate to defendant's physical resistance with three different officers as they attempted to subdue him. Each officer required medical treatment after fighting defendant. The stay order as to counts 2 and 3 is reversed. Section 654, subdivision (a) does not apply to crimes of violence against separate victims. (*People v. Lawrence* (2000) 24 Cal.4th 219, 234; *People v. King* (1993) 5 Cal.4th 59, 78.) As a result, section 654, subdivision (a), is inapplicable. Upon issuance of the remittitur, the following is to occur in connection with the three misdemeanor counts. The count 1 sentence is to run concurrently with all other sentences. The trial court's oral imposition of sentence failed to state whether the six month sentence was to run concurrently or consecutively. Hence, it must run concurrently as a matter of law. (§ 669; see 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 164, p. 192.) As to counts 2 and 3, the trial court ordered the six-month sentences stayed. The stay order was a legally unauthorized sentence. (See *People v. Scott*, *supra*, 9 Cal.4th at p. 354, fn. 17; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589.) Hence, upon issuance of the remittitur, because the stay order was a jurisdictional error, the trial court retains the authority to impose either consecutive or concurrent six-month sentences. (*People v. Welch* (1993) 5 Cal.4th 228, 235; *People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *In re Ricky H.* (1981) 30 Cal.3d 176, 190-192.)

5. Abstract of judgment

The Attorney General argues the abstract of judgment should be corrected to more accurately reflect the sentence imposed by the trial court. We agree. California Rules of Court, rule 12(c)(1) provides in pertinent part, "[O]n its own motion, the reviewing court may order the correction . . . of any part of the record." (See also *People v. Mitchell*

(2001) 26 Cal.4th 181, 186-188.) The abstract of judgment fails to reflect the jury's section 186.22 gang findings. While resentencing on remand, the trial court should direct the clerk to correct the abstract of judgment to reflect the finding in counts 7, 8, and 9 returned pursuant to section 186.22, subdivision (b)(1)(C) and to the actual 10-year enhancements imposed pursuant to section 12022.53, subdivision (b) and stayed.

IV. DISPOSITION

The sentence is reversed in the following particulars: the stayed sentences as to counts 2 and 3; the subordinate terms imposed as to count 7; and the stayed 13-year sentence as to count 9. Upon issuance of the remittitur, the trial court is to proceed to resentence defendant as to counts 2, 3, and 7 as discussed in the body of this opinion. As to count 9, the judgment is modified to state: a one-year term is imposed for felony assault with a firearm; in addition, a one-year, four-month sentence is imposed on the gang enhancement; the total term as to count 9 is to be two years, four months; the remainder of the potential period of incarceration is stayed pursuant to rule 4.447 of the California Rules of Court; and the entire count 9 sentence is stayed pursuant to Penal Code section 654, subdivision (a). As to both counts 5 and 6, the trial court is to impose additional 10-year enhancements pursuant to Penal Code section 12022.53, subdivision (b) as discussed in the body of this opinion. The judgment is affirmed in all other respects. Upon the completion of sentencing proceedings, the clerk of superior court is to prepare an amended abstract of judgment which reflects the newly imposed sentence

including the gang enhancements. The corrected abstract of judgment is to be forwarded to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.